No. 1584.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The California Development Company, (a corporation),
Appellant,

vs.

The New Liverpool Salt Company,
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF.

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Inasmuch as counsel for appellee in submitting his case, did not confine himself to filing a list of authorities as suggested upon the argument, appellant craves the indulgence of the court to file these few pages of reply.

I.

Counsel for appellee answering the contention of appellant that the allegations in the bill are interpreted and controlled by paragraph XII thereof, says:

"Appellant lays great stress upon the allegation of the bill that unless the defendant be required to construct headgates for controlling and regulating the amount of water flowing into its canal, the overflow complained of will continue. * * * The allegation upon which counsel lays so much stress might be omitted from the bill entirely, and there would still remain sufficient upon which to base the decree which was entered below. * * * [Pp. 2 and 3.]

Counsel apparently misapprehends the purport of appellant's point.

Appellant's position is, that the allegations in such paragraph, affirmatively preclude complainant from obtaining any relief from a court of equity.

The situation according to appellant is this:

Complainant comes to the chancellor and alleges that the defendant has done various acts, as a result whereof, the property of complainant is threatened with destruction, and then says:

" 'Unless it (defendant) be required to construct head gates for the controlling and regulating of the amount of water flowing into its said canal, the said water will continue to flow * * * and destroy and ruin' my property and business."

In other words, complainant after stating to the chancellor its grievances and its apprehensions, adds:

"Unless you require defendant to do certain things, you can be of no benefit to me."

The court of equity will investigate the acts complained of, and if under the limitations of its jurisdiction,

it has no authority to direct what complainant says must be directed in order to afford it the relief prayed, it must perforce reply to complainant:

"We find ourselves without power to do the acts which you declare to be essential to the saving of your property from destruction. We therefore can do nothing for you, and you must seek relief from another source."

Counsel claims that this point raised by appellant, was not raised in the lower court and was not assigned as error.

Present counsel has no knowledge of what was said upon the argument before the district judge, but certainly it cannot be assumed upon the record that such point was not made in argument.

The suggestion of counsel that had the point been raised, complainant could have met it by amendment, does not relieve the situation. The difficulty of complainant consists not in the form of pleading but in the existence of a fact alleged and sworn to by complainant and unquestionably true, which fact puts it beyond the power of a court of equity to give it the relief sought. Had complainant amended by withdrawing the allegation of this most material fact, defendant could have set it up as a defense to the jurisdiction of the court.

II.

Counsel says, at page 4:

"At the time of the commencement of the suit, and for a long time thereafter, the diversion through the California intake was very large, amounting on the date of

the filing of the complaint, to 1110 second feet, and increasing thereafter until, on the 21st of March, the diversion through that intake was 2590 second feet. These figures are from the report of the United States Geological Survey for the year 1905, page 23 (offered in evidence by defendant)."

The same point was suggested by counsel upon the argument. At that time counsel for appellee produced a volume (not, according to our recollection, one of the volumes of the official record), from which he read certain figures, indicating that on the 21st of March, the flow not through intake No. 1, but through the canal supplied by the headgate, around which intake No. 1 was cut, was some 2500 second feet, and counsel alluded at the time to the fact that the present counsel for appellant, not having taken part in the trial, had probably overlooked this important piece of evidence.

Counsel for appellee does not cite the number of the exhibit or the page of the record at which the report of the United States Geological Survey for the year 1905 may be found. A cursory examination of the record has failed to disclose to us any such report. But if the report should be a part of the record, and our recollection of it as stated upon the argument should be correct, it in no way tends to prove that intake No. 1 was open on the 21st of March, 1905. The government measurements according to such report, as we recall it, was taken about one mile below the headgate, and Intake No. 1; it did not indicate that any of the waters so measured flowed through the headgate, or the by-pass around it

designated Intake No. 1. The evidence shows that on the 20th of March, the river was at the extreme height of 30.3, and it appears in other portions of the record that at such height the waters of the river overflow its banks and find their way into the canals without regard to headgates or intakes. This overflow accounts fully for the volume of water in the canal so measured.

It will be remembered that intake No. 1 is a by-pass, cut around the original headgate constructed by the appellant. It is not claimed that this headgate was negligently constructed. The negligence charged at this point of diversion is confined to the opening of the unprotected by-pass and not to the construction of the headgate, which has withstood all floods and is still standing. The evidence quoted at page 9 of appellant's brief filed October 3 shows that this by-pass was closed prior to the March flood. Moreover, the fact that a mile below this head gate 2500 feet of water were flowing through the canal, does not tend to prove that this by-pass or intake No. 1 was still open, for, it is possible that the headgate itself had been opened, and in fact it is probable that appellant would have opened it in order to divert such water as could pass through such headgate, with a view to relieve the strain upon Intake No. 3, from which the serious danger was apprehended.

III.

Furthermore it is of but little consequence whether intake No. 1 was or was not open at the time the suit was commenced. The allegation in paragraph XII is that, unless the head gates (plural) be constructed, complainant's property must be destroyed. The closing of intake

No. 1 by the court would not have afforded complainant any relief unless intakes Nos. 2 and 3 were also closed.

Therefore a decree of the court directing the closing of intake No. 1, even assuming that it was open at the time of the commencement of the suit, would have been futile, and consequently the complainant would not have been entitled to such decree.

This principle is conclusively established in the case of Ward v. Mississippi &c. Co,. 2 Black 485, where the Supreme Court held that the Circuit Court erred in compelling the railroad company to pull down a portion of the piers of the bridge, because the pulling down of such portion would not give complainant the relief sought.

IV.

Most of the cases cited by counsel for appellee raise questions of venue and not of jurisdiction.

Miller & Lux v. Rickey Land & Cattle Co. sustains appellant's position, that the court has no jurisdiction. District Judge Hawley says in his opinion reported in 127 Federal, at page 575:

"It will, of course, be conceded at the outset that this court has no jurisdiction over lands and real estate situated without this district. *It cannot abate nuisances outside of the district.* It cannot reach property *in rem* wholly situated in other states. It cannot by any decree which it may make in this suit directly reach the dams, reservoirs or ditches belonging to the defendant, located entirely within the state of California."

The Circuit Court of Appeals affirming the decree of the district judge, reviews the authority bearing upon the legal principle that as to certain causes arising partly in one jurisdiction, and partly in another, the right of action will be entertained in either jurisdiction, and coming directly to the point at issue upon this appeal, says:

"In case of nuisance, however, where it is sought to abate the nuisance by injunctive process, it is requisite that the suit be instituted in the jurisdiction where the nuisance is maintained, because it is said the remedy is *quasi in rem,* and must act upon the thing itself which is causing the damage. This was held in the case of Stillman v. White Rock Manufacturing Co., Fed. Cas. No. 13,446 (23 Fed. Cas. 83.)"

Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11, at p. 16.

The principle thus stated is precisely the same as that enunciated by the Supreme Court of Iowa, in the case of Gilbert v. Moline Water Power & M. Co., 19 Ia. 319, cited in appellant's brief filed October 3d, and criticised as unsound by counsel for appellee both in his oral argument, and at page 8 of his last brief.

The decree should be reversed and the bill dismissed.

Dated Tucson, Arizona, December 10, 1908.

EUGENE S. IVES,

Of Counsel for Appellant.